No. 97-1802

In The

Supreme Court of the United States

October Term, 1997

DAVID CONN and CAROL NAJERA,

Petitioners,

vs.

PAUL L. GABBERT,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court exercise its discretion to grant review where to do so would result in piecemeal litigation, in that the Petition for Certiorari raises issues related to only a portion of the case, and, regardless of the disposition of the Petition, the remaining matter will need to be resolved in the district court?

2. Should this Court exercise its discretion, and grant the Petition, where the matter involves well-settled issues of law, does not depart from "the accepted and usual course of judicial proceedings," and does not create any conflicts within and among the lower courts?

3. Should this Court exercise its discretion to grant review in a case of unique disputed facts, that are highly unlikely to ever recur, and that merit a full resolution in the district court?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

RULES AND STATUTES

STATEMENT OF THE CASE

Procedural History

Petitioners are Los Angeles County Deputy District Attorneys; Respondent Paul Gabbert is an attorney licensed to practice law by the State of California. The Complaint in this case contains two claims against Petitioners David Conn and Carol Najera: 1) they violated the Fourth Amendment by conducting warrantless searches of Respondent Paul L. Gabbert; and 2) Petitioners' deliberately timed searches of Respondent Gabbert interfered with his ability to represent his client in violation of the Fourteenth Amendment. (1 Excerpts of Record on Appeal [ER] 1, 17, 20). The district court granted summary judgment in favor of all of the defendants as to both of Respondent's claims.[1] (1 ER 611). The court of appeals reversed the district court's ruling with respect to Petitioners Conn and Najera.

First, the court held that the Fourteenth Amendment protects an individual's right to practice his or her profession free from undue and unreasonable state interference. That right was violated here, the court concluded, when Petitioners Conn and Najera prevented Respondent from consulting with his client while she was testifying before the grand jury. Second, the court held that the Petitioners were not entitled to qualified immunity because the right

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[1] Two of the defendants below, Elliot Oppenheim and Leslie Zoeller, are no longer parties to this action. The Ninth Circuit affirmed the district court's dismissal as to defendant Oppenheim; Respondent settled with defendant Zoeller.

at issue was clearly established and the Petitioners' conduct was plainly intended to violate that right. The court's decision was premised on the twin principles that: 1) a witness has an established right to consult with her attorney outside the grand jury room, and 2) privacy and freedom from intrusion is essential to the attorney-client relationship. Third, the court held that Petitioner Conn violated Respondent's Fourth Amendment rights by causing a search of Respondent's belongings in "flagrant disregard" of the terms of the warrant. Specifically, the warrant dictated that the search of Respondent be conducted only by a special master, as required under California law. However, Petitioner Conn directed a police detective to conduct the search. Fourth, and finally, because the court determined that Petitioner Conn was "clearly aware" that California law permitted only a special master to search attorneys, he was not entitled to qualified immunity.

Petitioners' challenge to the decision of the court of appeals relates exclusively to Respondent's Fourteenth Amendment claim. Respondent's Fourth Amendment claim, which was remanded to the district court after the court of appeal decision, is unaffected by this Petition for Certiorari.

Statement of Facts

At its core, this case involves what ordinarily would be seen as a commonplace, but important, occurrence in the daily routine of a criminal defense attorney: the representation of an individual who, without immunity, has been compelled, by subpoena, to appear before a local

grand jury to testify and to produce documentary evidence. The respective roles, duties, obligations, and rights of the prosecutors, government investigators, defense counsel, and the witnesses or targets of the inquiry, in this context, are well-settled. The factual setting presented here, however, is anything but ordinary. The sensational historical context in which this case arises is, of course, fortuitous. By contrast, the calculated, deliberate efforts to thwart defense counsel's ability to discharge his professional obligations to his client, undertaken by two Los Angeles prosecutors (who, according to each of the two courts below, were acting in their investigative capacities), are not. Nonetheless, the application of clearly-established constitutional rules – even in this aberrant setting – remain constant.

This matter arises out of Respondent Paul L. Gabbert's ("Gabbert") representation of Traci Baker ("Baker"), a young waitress who had been called as a defense witness in the high-profile murder trial of Erik and Lyle Menendez. The first Menendez trial resulted in a hung jury. After that trial, Petitioners David Conn ("Conn") and Carol Najera ("Najera"), both Los Angeles County Deputy District Attorneys, received information that Baker was in possession of a letter, written to her by her former boyfriend, Lyle Menendez. Petitioners believed that in this letter, Menendez instructed Baker to testify falsely at his trial. As the following events reveal, Conn and Najera were determined to obtain this letter and even more determined to win the second trial of Erik and Lyle Menendez.

Conn and Najera's initial efforts to locate the letter tracked standard investigative procedures. A subpoena

was issued compelling Baker's appearance before the grand jury on March 21, 1994. (1 ER 6). The subpoena also ordered Baker to produce any correspondence to her from Lyle Menendez. (1 ER 6). On March 17, 1994, Gabbert accepted service of the subpoena on Baker's behalf. (1 ER 6).

Having concluded that the subpoena potentially implicated Baker's Fifth Amendment rights, Gabbert, on his client's behalf, attempted to move to quash the subpoena on March 18th, the Friday before his client's scheduled Monday appearance. (1 ER 6). The motion was never ruled on. (1 ER 7). Gabbert accompanied Baker to her grand jury appearance the following Monday morning. At this pivotal juncture, Petitioners' conduct ceased being in accord with conventional, or even lawful, procedure.

Because, by Friday evening, March 18th, the motion to quash the subpoena had not been granted, Conn and Najera knew that Baker was required to appear before the grand jury on March 21st and produce whatever responsive documents she had in her possession. Nonetheless, on the evening of Friday, March 18th, Conn and Najera, accompanied by Beverly Hills Police Officers Leslie Zoeller and Stephanie Miller, personally searched Baker's apartment, looking for the Menendez letter. (1 ER 7). The letter was not found. On the morning of Baker's grand jury appearance, Conn and Najera redoubled their efforts to get the letter.

At 8:30 a.m. on Monday morning, March 21st, Baker, represented by Gabbert, checked in with the grand jury bailiff for her scheduled appearance. (1 ER 9). Waiting in the hallway outside the grand jury room, Gabbert and

Baker were approached by Conn and Najera. Petitioners engaged Gabbert in a discussion regarding a possible grant of immunity for Baker. The four went to Conn's office, purportedly to discuss further the prospect of a grant of immunity. (2 ER 345-46, 405-406). Based on his conversations with Conn and Najera that morning, Gabbert believed that Conn would prepare a draft letter of immunity for Baker.

Gabbert and Baker returned to the grand jury area to wait for Conn and Najera to bring the immunity letter. (2 ER 348-50). Instead of preparing an immunity letter, as Conn had led Gabbert to believe, Conn and Najera applied for and obtained a search warrant for the person and effects of Paul Gabbert. (2 ER 413, 418, 420, 450-51). Conn had already decided to obtain the warrant at the time Gabbert and Baker were in his office discussing the immunity issue. Conn specifically planned that the warrant would be executed just before Baker's scheduled testimony. (2 ER 425-26).

Conn and Najera stood by and watched Detective Zoeller serve Gabbert with the warrant. They also watched as Elliot Oppenheim, the special master retained to conduct the search, took Gabbert into a separate room to begin the search. (2 ER 427-28, 458). The briefcase and files that Gabbert took with him to the courthouse contained the following items:

a) an attorney-client correspondence and document file as to Baker;

b) two other client files containing privileged attorney-client and work-product materials;

c) Gabbert's calendar, containing extensive handwritten entries and notes including a list of past and present client names, addresses, and telephone numbers, as well as personal information;

d) a leather pocketbook/wallet;

e) a Dictaphone;

f) an eye glass case; and

g) a tablet of paper containing, among other things, a list of "things to do" and a list of client names and corresponding information which revealed the client's billing status.

(1 ER 14).

Although Gabbert repeatedly objected to the search because his briefcase and files contained attorney-client work-product, as well as privileged attorney-client communications, Oppenheim read the contents of each file and attempted to have the files photocopied. (1 ER 14, 15). Moreover, Oppenheim questioned Gabbert about his fee arrangement with Baker, asked Gabbert for his home address, and commented about personal information he found in Gabbert's calendar which related to Gabbert's fiancé. (1 ER 16).

As the search of Gabbert was in progress, which necessarily caused Gabbert to be removed and separated from his client, Conn and Najera entered the grand jury room; Baker was then called as a witness. (2 ER 428, 430-31). Just moments before Baker was called as a witness and the search of Gabbert began, Conn asked Gabbert, in his client's presence, whether, if a determination to arrest Baker was made, Gabbert would surrender

Baker in Los Angeles or whether she would have to be arrested in Orange County. (2 ER 376, 395). Overhearing this conversation, Baker, already apprehensive due to the inherently intimidating nature of the grand jury, became unnerved. She then saw her attorney surrounded by law enforcement officials and taken away to be searched. Baker described her state of mind as follows:

> Suddenly there's a search warrant. My attorney is taken away from me. And I was shaking, really upset, I don't know, I'm going to go into a room with a bunch of people I don't know that are going to ask me questions, and I don't know what I should say. So I come out looking for the only rock that I have for help, and he wasn't there. So I'm stuck with some bailiff guy and nobody sitting there. I'm not saying that to be dramatic. That is exactly how I felt.

(2 ER 395).

In response to the first question put to her before the grand jury, Baker stated that she wanted to confer with her attorney but had not been able to because he was detained by the special master. She then asked for an additional opportunity to consult with Gabbert. (2 ER 392-393). Baker, however, could not talk to her lawyer because he was still being searched. (2 ER 393). Gabbert knew that Baker wanted to consult with him; he requested that the grand jury proceedings be delayed until the search was completed so that he could fulfill his obligation to his client and be available to counsel her. (2 ER 360). This request was denied and Baker was commanded to return to the grand jury room. (2 ER 355, 357-58, 385).

Baker returned to the grand jury room, distressed and upset. (2 ER 387-90). In response to the next question put to her, Baker reiterated her request to confer with her attorney. (2 ER 516). Again, Gabbert was not available to speak with his client because he was still being searched. (2 ER 387-88). Baker was ordered back before the grand jury. (2 ER 388). She was now in an even greater state of agitation, not knowing whether she had responded to the previous question appropriately and unsure how to respond to the pending question. *Id.* In response to the third question, Baker once more sought to confer with her attorney. (2 ER 517). Upon exiting the grand jury room on this occasion, Baker was confronted with Gabbert being searched by another person – Detective Zoeller. (2 ER 389-90). While Conn initially requested that Zoeller perform an additional search of Gabbert, during the break in the grand jury proceedings, Conn personally participated in the search, as well. (2 ER 360, 389-90, 469, 488, 490-492).

Shortly thereafter, Baker, still separated from Gabbert because of the orchestrated search, was taken before the Los Angeles County Superior Court, where Conn and Najera initiated contempt proceedings relating to Baker's supposed failure to produce the subpoenaed documents. (2 ER 393). Baker was not held in contempt. Within minutes, Conn and Najera obtained yet another search warrant, this one for Gabbert's law offices. (1 ER 58).

Gabbert subsequently filed the lawsuit that underlies the instant petition.

REASONS WHY THE PETITION SHOULD BE DENIED

Standards For Granting Review

In determining whether to exercise its discretion to grant a petition for certiorari to review a decision of a United States Court of Appeals, the Supreme Court typically takes into consideration the following factors:

a) whether a court of appeals has entered a decision in conflict with the decision of another court of appeals;

b) whether the court of appeals has decided an important federal question in a way that conflicts with a decision by a state court of last resort;

c) whether the court of appeals has so far departed from the accepted course of judicial proceedings as to call for an exercise of the Supreme Court's supervisory power;

d) whether a court of appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court; or

e) whether a court of appeals has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court.

Sup.Ct.R. 10. A petition is rarely granted where the asserted error consists of the misapplication of a properly stated rule of law. *Id.*

As demonstrated below, this case does not implicate any of the legal questions this court traditionally reviews. There is no split among the circuit courts with respect to

the legal principles at issue in this case. The decision below does not conflict with decisions of this Court or the California Supreme Court. Finally, the court of appeals did not resolve an unanswered federal question or depart from the accepted course of judicial proceedings.

What this case does involve is the application of established legal principles to a unique and factually specific situation. In short, as will become apparent, the conduct at issue and the ensuing litigation arose in the context of, and because of, a politically motivated, high-profile murder case. The conduct complained of likely would not have otherwise occurred and likely will not occur again. Consequently, this Court should not expend its resources reviewing a matter that will never repeat itself.

1. The Principles Of Judicial Economy And The Goal Of Orderly Judicial Administration Establish That This Petition Should Not Be Granted

Piecemeal appellate review is clearly disfavored. As this Court has articulated, except in certain narrowly defined circumstances, appellate review should be limited to the adjudication of entire cases in which final judgments have been entered. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). This restriction prevents "the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in a practical consequence, but a single controversy." *Id.* Phrased another way, the "federal concept of sound judicial administration will not normally be furthered by 'having piecemeal appeals . . . instead of having the trial judge,

who sits alone and is intimately familiar with the whole case, revisit . . . the case.' " *Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 167 (11th Cir. 1997) (citation omitted).

If the Court grants review now, this type of piecemeal litigation is guaranteed because Respondent's Fourth Amendment claim is not a subject of this Petition, and remains to be litigated in the district court. Thus, whatever the disposition of the Petition for Certiorari, the Fourth Amendment claim will still have to be resolved below. Moreover, as the court of appeals concluded, only a complete exploration of the underlying facts will allow for an appropriate resolution of this matter. The court stated:

> In the procedural posture this case comes to us, we are necessarily limited. Only the fullness of discovery and perhaps a trial on the merits can fully explore Gabbert's claims and the defendants' defenses. Defendants may be able to establish that, whatever they did, it did not materially affect Gabbert's rights. We can only say that Gabbert's claims merit full exposition and defendants' defenses complete exploration.

Gabbert v. Conn, 131 F.3d 793, 806 (9th Cir. 1977). Once there is a resolution of all claims in district court, including the Fourth Amendment claim that is unchallenged in this Petition, an additional appeal may proceed through the circuit and, perhaps, back to this Court. At that time, if review is appropriate, it could be granted. To do so now would be premature. The principles of judicial economy are far better served by allowing the district court to resolve both the Fourth and Fourteenth Amendment

issues together, and, depending on the final outcome, the losing party may then choose to appeal the entire case.

2. The Legal Principles Here Are Clearly Established; The Fortuity That These Clearly Established Issues Arose In A High Profile Murder Case Does Not Present A Special Or Important Issue For Review

The core legal issue in this case is whether case law has clearly established that an attorney has a constitutional right to practice his profession free from unreasonable governmental interference. Unquestionably, it has. It is bedrock constitutional law that the Fourteenth Amendment protects the right of individuals to engage in any of the "common occupations of life." *Truax v. Raich*, 239 U.S. 33, 41 (1915); *Meyer v. State of Nebraska*, 262 U.S. 390, 399 (1923); *Green v. McElroy*, 360 U.S. 474, 492 (1959); *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972); *In re Griffiths*, 413 U.S. 717, 722-27 (1973). Indeed, the judiciary's recognition of the right to practice one's occupation free from undue intrusion predates many of the more contemporary categories of substantive due process rights that have emerged only in the last thirty years. *See, e.g., Boddie v. Connecticut*, 401 U.S. 371 (1971) (due process right of access to the courts); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (due process right to privacy). As case law also makes clear, the Constitutional right to engage in one's occupation necessarily incorporates the right to perform all aspects of one's profession, including its "day-to-day"

activities, according to the "highest standards of the profession."[2] *See Nyberg v. Virginia*, 495 F.2d 1342, 1344 (1974), *cert. denied*, 419 U.S. 891 (1974); *Keker v. Procunier*, 398 F.Supp. 756, 761 (E.D. Cal. 1975); *Young Women's Christian Ass'n of Princeton v. Kugler*, 342 F.Supp. 1048, 1055 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1973). If it did not, the right to practice one's profession would be illusory – a profession manifestly consists of, and is defined by, its day-to-day activities. Teachers must be able to have a say in the curriculum they teach, *Meyer*, 262 U.S. at 400-401; doctors must be able to practice medicine according to their professional judgment, *Roe v. Wade*, 410 U.S. 113, 164-166 (1973); and lawyers must be able to have access to their clients in order to advise them. *Wounded Knee Legal Defense/Offense Comm. v. Federal Bureau of Investigation*, 507 F.2d 1281, 1284 (8th Cir. 1974); *Steinke v. Washington County*, 857 F.Supp. 55, 57 (D. Ore. 1994); *Keker v. Procunier*, 398 F.Supp. at 760, 764-65.

Contrary to Petitioners' contentions, the right to practice one's profession is not limited to situations where the individual is "either entirely prevented from working in his or her chosen profession . . . , or effectively prevented from working in any profession at all. . . . " Petition at p. 15. *Meyer v. State of Nebraska*, upon which Petitioners heavily rely, is instructive. In *Meyer*, a state statute prevented a teacher from teaching a portion

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[2] The court of appeals observed that the precise conduct before the court need not have previously occurred for the right to be considered "clearly established." Indeed, as the court recognized, the "unusual facts of this case preclude 'the very action in question' from being clearly established." *Gabbert*, 131 F.3d at 801.

of his curriculum, *i.e.*, teaching a foreign language to students of a certain age. The teacher was not prohibited from teaching altogether. Nonetheless, the Court held that the interference with the teacher's right to practice his profession was "plain enough." 262 U.S. at 402.

Even if the standard were, as Petitioners suggest, that Respondent be completely denied the ability to practice his profession, that standard would be amply met here. At minimum, an attorney's professional obligation includes the duty, and right, to consult with his client. *United States v. Tucker*, 716 F.2d 576, 581 (9th Cir. 1983); *Coles v. Peyton*, 389 F.2d 224, 225-26 (4th Cir. 1968), *cert. denied*, 393 U.S. 849 (1968). *See also Adams v. Balkcom*, 688 F.2d 734, 738 (11th Cir. 1982); *United States v. Porterfield*, 624 F.2d 122, 124 (10th Cir. 1980). As the Ninth Circuit observed in *Tucker*, "adequate consultation between attorney and client is an essential element of competent representation of a criminal defendant." 716 F.2d at 581. To prevent a lawyer from performing this critical function *is* to prevent him from practicing his profession. Clearly, denying a lawyer access to his client is functionally no less of a constitutional deprivation than it is to impede a physician from consulting with his patient. Indeed, as the Eighth Circuit opined, it may be said "[w]ith even stronger force [than for a doctor-patient relationship] that a lawyer has standing to challenge any act which interferes with his professional obligation to his client. . . . " *Wounded Knee*, 507 F.2d at 1284. *See also Keker v. Procunier*, 398 F.Supp. at 760 ("Just as the physician is entrusted by society with the enhancement and preservation of life and health, the attorney is charged with advancement

and protection of property, of liberty, and occasionally, of life.").

Perhaps nowhere is consultation with an attorney more important than when a client is brought before a grand jury, after having been informed, as here, that she is a target of the government's investigation and that an arrest might be imminent. Thus, the right of a client to consult with her attorney outside the grand jury room is clearly established. *United States v. Mandujano*, 425 U.S. 564, 581 (1976); *United States v. Plache*, 913 F.2d 1375, 1380 (9th Cir. 1990); *United States v. Schwimmer*, 882 F.2d 22, 27 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *In re Grand Jury Proceedings*, 859 F.2d 1021, 1024 (1st Cir. 1988). The witness' right to consult with her attorney, as well as the attorney's right and obligation to carry out his professional duty, is, of course, meaningless if, at the very moment she attempts to exercise that right, the government physically prevents her from doing so by blocking her access to her attorney.

Here, Petitioners carefully orchestrated the service of the search warrant on Gabbert to coincide with the precise moment in time that Baker would be called before the grand jury. The calculated timing of their plan was effectively conceded by Petitioner Najera. She acknowledged at her deposition that she was aware, when these events occurred, that Baker had the right to consult with Gabbert during her grand jury appearance. (2 ER 443). She acknowledged, as well, that she was aware that Gabbert accompanied Baker to the courthouse for that specific reason. (2 ER 451-53). Petitioner Conn was more direct. At his deposition he stated:

> But I also knew by this point [referring to the meeting with Gabbert and Baker in his office on Monday morning before Baker testified] that we would be getting a search warrant. And once we had the warrant, there might be a change of strategy on [Gabbert's] part.

(2 ER 413).[3]

The profound impact which Petitioners' strategy had on Baker, who had retained counsel for the very purpose of guiding her through the inquisition of which she was a target, was predictable in both nature and degree:

> And I came out (of the grand jury room) and proceeded to wait for what I perceived as a considerable amount of time, although it probably wasn't, in fact. I don't know. I was super, super, super nervous, real upset because I wasn't able to see Paui. I didn't know, in fact, whether I should have asserted the Fifth Amendment on the first question, and I was waiting, again. And I don't know if you've ever had to testify before the grand jury, but making 50 people, or however many people, wait for you, constantly going out of the room made me even more upset. I was real upset waiting, and it seemed like an eternity. I recall the bailiff was there with me. And at that point – at some point, I was directed to go back into the room, that they could not wait any longer, that I had to go back into the room. And I said I needed to talk to my attorney. And I don't know if they

[3] Counsel for Petitioners conceded at oral argument before the court of appeals that the timing of the search was designed to prevent Gabbert from consulting with Baker. *Gabbert*, 131 F.3d at 803, n.4.

> said, "Too bad," but they said, "I'm sorry, ma'am, you have to go in." I don't know who said that to me.

(2 ER 387-88).

Petitioners' attempts to sanitize these events by claiming that Gabbert "simply *chose* not to speak" with Baker, that Gabbert was merely "distracted," and that, in any event, Baker was able to adequately assert her Fifth Amendment privilege, are disingenuous. To begin with, each time Baker left the grand jury room, her lawyer was being searched – first by a special master, then by a police detective, and the third time by the very same prosecutor who was investigating *her*. (2 ER 377-78, 380-82, 387-88, 389-90). Without doubt, Gabbert was required to submit to the search since the warrant appeared facially valid. At the same time, however, Gabbert was obligated both to represent Baker's interests zealously and free of conflict *and* to protect the confidentiality of all the client files in his briefcase – some of which related to Baker and some of which related to his other clients. *See De Massa v. Nunez*, 770 F.2d 1505, 1507-1508 (9th Cir. 1985) (attorney is obligated to protect attorney-client files from disclosure). *See also Swindler & Berlin v. United States*, ___ U.S. ___, 118 S.Ct. 2081 (1998) (noting importance of attorney-client privilege).

Here, Petitioners carefully gauged their actions to insure that Gabbert could not meet these obligations. They timed the service of the warrant to coincide with Baker's entry into the grand jury room and then, without reason or justification, refused to delay her appearance for the matter of minutes it would take for the search to

conclude. An attorney forced to protect one client's interests at the expense of another's can hardly be said to have *chosen* to have done so as Petitioners suggest.[4]

Moreover, while Baker did assert her privilege against self-incrimination in response to questioning before the grand jury, she did so not knowing what else to do. She simply hoped that it was the appropriate course to take under the circumstances, based solely on the "body language" of Gabbert, whom she attempted to view through a partially obstructed door. (2 ER 383-85). Baker's invocation of the Fifth Amendment was not based on the counsel of her attorney. In reality, Baker was reading from a card which she had brought with her to rely on if her attorney did advise her to assert the Fifth Amendment. (2 ER 386, 392). She carried the written invocation with her into the grand jury room because she was frightened and nervous and feared that she might forget the appropriate words if Gabbert instructed her to assert the Fifth Amendment. *Id*. Reading words off a card because of a guess that it is the right thing to do is not tantamount to the undertaking of an act following "adequate consultation" with your attorney. Because she was

[4] Petitioners' argument – that the result of the government's actions in the present case is substantially equivalent to a prison bus delay – both ignores the facts and disregards the law. Petition at p. 21. Unlike Petitioners' "bus scenario," the *government* in this case *deliberately interfered* with an attorney's representation of his client. It is this intended interference with a clearly established right that frames the basis of the claim here. To pose an analogous hypothetical, one would have to assume that the bus delay was intentionally engineered by prosecutors to prevent one of the prisoners on that bus from receiving effective assistance of counsel.

uncounseled and unprotected, it was mere fortuity that Baker asserted her right against self-incrimination. In fact, had she failed to "guess right" and failed to invoke the Fifth Amendment as to the first question put to her, she likely would have waived her ability to do so in response to further questioning given the nature and scope of the initial question. (1 ER 15, 2 ER 516).

The Constitutional right at issue here – Gabbert's right to represent his client without arbitrary governmental interference – is not novel or unique. This Court has recognized this principle for years. The only thing novel is the extraordinary lengths to which the Petitioners went in order to violate that right. Because no special, important, or even unsettled legal issues are implicated in this matter, the Court should not grant review.

3. Because The Decision Below Turns On A Unique Set Of Facts Unlikely To Recur, Review Is Unjustified

This case arose in the context of one of the most well-publicized murder trials in recent history. The first Menendez trial resulted in a hung jury. At re-trial, the prosecutors took a "no holds barred" approach to obtaining the evidence they believed was critical to their success. The facts that underlie the Petition establish that. The Petitioners' conduct is unprecedented and likely occurred only because of the pressures of a high-profile, politically charged case. *See* Ted Rohrlich, *High Profile Losses Tarnish Reputation of District Attorney's Office: Prosecutors Win Most Cases, But Failures Like Menendez and McMartin Invite*

Criticism of Tactics, L.A. Times, March 6, 1994 at A1; Steve Proffitt, *Gilbert Garcetti; In Hot Seat as L.A. District Attorney*, L.A. Times, March 13, 1994 at M3. While the historical context in which the Petitioners' conduct occurred does not justify the conduct, or alter its unlawfulness, it does compel the conclusion that the situation is highly incapable of repetition.

Petitioners suggest that, because contentious disputes between prosecutors and defense counsel are commonplace events, allowing the decision below to stand will encourage defense lawyers to sue prosecutors every time a defense lawyer is unable to represent his client with complete success. There is no support for this suggestion. As a threshold matter, Petitioners' conduct does not remotely resemble the garden-variety daily conflicts between prosecutors and defense counsel (or for that matter between all litigation adversaries). Moreover, the court of appeals' decision does not inhibit a prosecutor from fulfilling the duties and obligations of his office or from using all of the legal tools in his arsenal to do so. As this Court has long recognized, a prosecutor's primary duty is to see that justice is done; a prosecutor may "strike hard blows, but not foul ones." *Berger v. United States*, 295 U.S. 78, 88 (1935). Violating the United States Constitution does not further the pursuit of justice.

It is obvious that this case involves extraordinary facts. Thus, the appellate court's holding involved a limited application of established law to unique facts. The "unusual facts" of this case and the limited holding below do not portend the Petitioners' apocalyptic claim of a rush to the courthouse by disgruntled defense attorneys. As the court stated in the opinion below:

> Our holding does not provide a basis for a private attorney to resist legitimate criminal procedure and litigation devices – such as search warrants or discovery requests – in cases against the government. Nor does our holding transform every violation of a client's constitutional rights into a corresponding violation of an attorney's constitutional rights. . . . [O]ur holding is narrow: a state government violates an attorney's Fourteenth Amendment rights when its officers unduly and unreasonably interfere with the attorney's right to practice his profession by preventing the attorney from offering legal assistance to the client in the very matter and at the very moment for which the lawyer was retained.

131 F.3d at 803.

Given the procedural posture and unique fact-driven nature of this case, Respondent submits that it would be inappropriate for this Court to grant the Petition. Regardless of this Court's action, factual issues will remain, as articulated by the Ninth Circuit, to be resolved by a jury in the district court. No novel legal issues arise here; this matter is one of well-settled law, and not split within the circuits. Given that, the Petition should be denied.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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